No. 16141

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE COLEMAN COMPANY, INC., a corporation,

Appellant,

vs.

HOLLY MANUFACTURING COMPANY, a corporation,

Appellee.

Appendix to Reply Brief of Defendant-Appellant the Coleman Company, Inc.

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APPENDIX A.

Prior to 1946 the patent damage statute, 35 U. S. C. §70 (Rev. Statute, § 4921), provided that:

> "* * * upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the *profits* to be accounted for by the defendant, the *damages* the complainant has sustained thereby * * *" (Emphasis added.)

The foregoing statutory provision was amended in 1946 (60 Stat. 778) to read:

> "* * * upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover *general damages* which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor * * *"

By making the basis of recovery in patent infringement suits "general damages" rather than "profits" and "damages," the intention of Congress was to limit the patent owner to his actual, provable damages, or alternatively to a reasonable royalty. House Report No. 1587 (79th Congress, 2nd Session) explains the purpose of the bill as follows:

> "The object of the bill is to make the basis of recovery in patent-infringement suits general damages, that is, *any damages the complainant can prove,* not less than a reasonable royalty, together with interest from the time infringement occurred, *rather than profits and damages.*"
>
> "Although the bill would not preclude the recovery of profits *as an element of general damages,* yet by making it unnecessary to have proceedings before

> masters and empowering equity courts to assess general damages irrespective of profits, the measure represents proposed legislation which in the judgment of the committee is long overdue." (Emphasis added.)

The definition of general damages as "any damages the complainant can prove" was specifically referred to when the bill was taken up on the floor of the House. (Congressional Record, Mar. 4, 1946, p. 1894.) The report of the Senate Committee on Patents also emphasized that the object of the bill was to make the basis of recovery the damages that the patent owner could prove. (Senate Report No. 1503, 79th Congress, 2nd Session.)

Thus, it is quite clear from the legislative history of the 1946 amendment to the patent damage statute that thereafter a patent owner could only claim as a matter of right his actual, provable damages as distinguished from the infringer's profits, and that the infringer's profits could only be reached by proving that they were an element of the damage actually sustained. This interpretation was expressly confirmed in the first case construing the 1946 amendment. (*Ric-Wil Co. v. E. B. Kaiser Co.*, 179 F. 2d 401, 407 (7th Cir., 1950).)

In the *Ric-Wil* case the lower court had entered a judgment requiring the defendant to account for and pay to plaintiff all profits realized by defendant through the infringement. The Court of Appeals held that this judgment was contrary to the amended statute, stating (p. 407):

> "The recent provision does not use the word 'profit.' It provides recovery for nothing other than 'general damages.' What elements may be included in such damages is not stated, except that they shall be due compensation.' *The language appears to make it*

> *plain that profits realized by an infringer are not recoverable as such.* 'General damages' is a broad term which no doubt may include numerous elements depending upon the circumstances of the case. And whether an infringer's profits is *an element of such damages* depends upon the facts of each individual case." (Emphasis added.)

The standard of proof for making out a case for profits "as an element of damages," as distinguished from claiming "profits as such," was clearly delineated by the Seventh Circuit Court of Appeals shortly after its decision in the *Ric-Wil* case. In *National Rejectors v. A-B-T Mfg. Corp.*, 188 F. 2d 706, 709-710 (7th Cir., 1951), that Court approved an award of defendant's profits as plaintiff's damages where the evidence conclusively established that but for the infringement all of defendant's sales would have been made by plaintiff and that plaintiff would have made the same profit on the sales.

The Court of Appeals for this Circuit has referred with approval to the interpretation of the patent damage statute as set forth in the *Ric-Wil* case. See *Faulkner v. Gibbs*, 199 F. 2d 635, 638, ft. 5 (9th Cir., 1952). The decision in the *Faulkner* case also makes clear that the patent owner's damages are ordinarily measured by the reasonable royalty standard unless there is an established royalty. The other basis for damages mentioned in the *Faulkner* opinion is for the patent owner's "loss of profits resulting from the infringement." (Opin. p. 638, ft. 7.) This, of course, is entirely consistent with the holding of the Seventh Circuit Court of Appeals in the *National Rejectors* case, wherein the defendant's profits were awarded to plaintiff upon proof that plaintiff had actually lost an equivalent amount of profits.

Every decision since the 1946 amendment to the patent damage statute has awarded only such damages as the patent owner could prove, and the courts have uniformly refused to award defendant's profits as an element of plaintiff's damages unless the evidence clearly established that but for the infringement, defendant's profits would have been plaintiff's profits. (See Op. Br. pp. 34-37.)

The fragmentary portions of the legislative history of the 1946 amendment set out in Appendix C of Holly's brief do not support its contention that an infringer's profits can be awarded without proof that the patent owner's actual damages are measured by such profits. Certainly Mr. Lanham's offhand comments to Mr. Cole and Mr. Cravens were not intended to contradict the statements in the official House Report on the bill (quoted in full above) that the damages recoverable under the amended statute are limited to "any damages the complainant can prove; not less than a reasonable royalty, * * *, rather than profits and damages." (House Report No. 1587, 79th Congress, 2nd Session.)

APPENDIX B.

The following are the Profit and Loss Statement [Ex. "B"], Statement of Cost of Goods Sold [Schedule "1"], Schedule of Manufacturing Expense [Schedule "2"], Schedule of Selling Expenses [Schedule "3"], Schedule of Administrative Expenses [Schedule "4"], and Schedule of Engineering Expense [Schedule "5"], of Holly's Annual Audits for the calendar years 1952, 1953 and 1954, which audits are in evidence as Plaintiff's Accounting Exhibits 24, 25 and 26, respectively [R. 1312-1313; 1343].

POTENTIAL HOLLY PROFIT ON UNITS SOLD BY COLEMAN (DOMESTIC SALES ONLY)
FROM 1952 THROUGH MARCH 11, 1957

	1952	1953	1954	1955	1956	1957 (1st 3 mos.only)	Total
Gross Profit @ Actual - Holly	$1,072,777.00	$ 955,059.00	$1,160,082.00	$1,439,655.00	$1,188,894.00	$ 227,054.00	
Less Selling Expense	$ 219,412.00	$ 245,070.00	$ 305,397.00	$ 348,231.00	$ 439,339.00	$ 136,647.00	
Sales Profit - Holly	$ 853,365.00	$ 709,989.00	$ 854,685.00	$1,091,424.00	$ 749,555.00	$ 90,407.00	
Units Sold - Holly	58,762	57,000	68,365	77,341	66,785	14,478	
Average Sales Profit per Unit Sold - Holly	$ 14.52	12.46	$ 12.50	$ 14.11	$ 11.22	$ 6.24	
Domestic Unit Sales by Coleman	2,832	28,924	28,016	29,284	25,478	3,884	118,418
Profit @ Holly Rate on Coleman Sales	$ 41,121.00	360,393.00	$ 350,200.00	$ 413,197.00	$ 285,863.00	$ 24,236.00	$1,475,010.00

The above profit computation assumes Administrative and Engineering expenses remain fixed regardless of volume and that Sales Expenses varies in proportion to volume. This is a very conservative appraisal ignoring the fact that some elements of Sales Expense are fixed. This method of computation could be further justified by the fact that fixed portions of Manufacturing costs such as Depreciation, Real Estate Taxes, Insurance, which have been ignored, more than offset variable items of Administrative and Engineering expenses. The above profit computation is based on actual Net Sales prices and the computation does not take into consideration the fact that Holly might have sold at higher prices.

Exhibit "B"

HOLLY MANUFACTURING COMPANY
PROFIT AND LOSS STATEMENT
FOR THE YEAR ENDED DECEMBER 31, 1952

			Percent to Sales
Sales			
Dealers, California	$ 2,195,122.27		66.4
Jobbers, California	257,918.34		7.8
Jobbers, Interstate	903,239.50		27.3
	$ 3,356,280.11		101.5
Less: Discounts allowed	51,011.40		1.5
Net Sales		$ 3,305,268.71	100.0
Cost of Goods Sold			
Standard cost (Schedule #1)	$ 2,008,957.78		60.8
Purchase variation	101,561.20		3.1
Material usage variation	4,446.65		1.4
Manufacturing cost variation	122,484.56		3.7
Finished goods inventory corrections	(4,958.44)		(1.5)
Total cost of goods sold		2,232,491.75	67.5
Gross Profit		$ 1,072,776.96	32.5
Expenses			
Selling (Schedule 3)	$ 219,412.34		6.6
Administrative (Schedule 4)	239,655.60		7.3
Engineering (Schedule 5)	53,016.42		1.6
Total Operating Expenses		512,084.36	15.5
Net Operating Profit		$ 560,692.60	17.0
Other Income			
Discounts earned	$ 8,346.35		
Interest earned	5,763.40		
Rents received	140.00	14,249.75	.4
		$ 574,942.35	17.4
Other Expenses			
Interest paid	$ 81.66		
Miscellaneous	16.56	98.22	-0-
Net Profit before Taxes		$ 574,844.13	17.4
California franchise tax		23,092.73	.7
		$ 551,751.40	16.7
Provision for federal income and excess profits tax		342,230.01	10.4
Net Profit after Taxes		$ 209,521.39	6.3

HOLLY MANUFACTURING COMPANY
STATMENT OF COST OF GOODS SOLD
FOR THE YEAR ENDED DECEMBER 31, 1952

Inventory of finished goods, January 1, 1952			$ 165,203.58
Cost of goods manufactured			
Inventory, January 1, 1952			
Raw materials	$ 196,376.61		
Work in process	111,195.45	$ 307,572.06	
Purchases at standard		1,360,933.14	
Manufacturing expense (Schedule "2")	$ 672,984.31		
Less: Manufacturing cost variation	122,484.56	550,499.75	
Mark-up of inventories		2,686.14	
		$ 2,221,691.09	
Less: Inventories, December 31, 1952			
Raw materials	$ 193,011.00		
Work in process	125,327.00	318,338.00	
Cost of goods manufactured			1,903,353.09
Purchases of finished goods			6,450.71
Finished goods inventory variance			4,938.03
Mark-up of finished goods			2,110.66
			$ 2,082,056.07
Less: Inventory of finished goods, December 31, 1952			73,098.29
Cost of goods sold			$ 2,008,957.78

Schedule "2"

HOLLY MANUFACTURING COMPANY
SCHEDULE OF MANUFACTURING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1952

Supervision	$ 77,176.05
Labor	517,001.30
Payroll taxes	18,082.78
Utilities	7,427.24
Shop supplies	10,650.97
Taxes	20,214.95
Insurance, general	1,518.72
Insurance on employees	15,409.86
Depreciation	46,113.21
Amortization of A.C.A. approval	712.34
Maintenance of motor vehicles	3,418.50
Rental of equipment	10,853.39
Subcontracted labor	1,800.96
Production supplies	4,911.90
Miscellaneous shop expense	9,813.27
Production tools	4,825.16
A.C.A. inspection	3,021.00
Repairs to machinery and equipment	9,159.62
Obsolescence	6,673.32
Perishable tools	14,117.94
Material handling	10,248.42
Janitor supplies	3,900.13
Manufacturing service	169.83
Employee relations	4,720.59
Employee recreation fund	377.65
Advertising, employment	1,204.08
Office supplies and printing	287.51
Traveling expenses	281.71
Supplies for employees	29.69
Maintenance of buildings and area	7,650.11
Maintenance of production tools	2,041.63
Maintenance of machinery and equipment	5,442.99
Maintenance of perishable tools	1,622.32
Maintenance of material handling equipment	685.31
Maintenance of service machinery	2,514.32
Total manufacturing expense	$ 824,078.77
Less: Manufacturing burden relieved	151,094.46
Net Manufacturing Expense	$ 672,984.31

HOLLY MANUFACTURING COMPANY
SCHEDULE OF SELLING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1952

Salaries	$ 67,183.64
Service salaries	10,483.30
Manufacturer's agents' commissions	42,103.24
Travel expense	6,402.65
Payroll taxes	1,899.02
Insurance, general	76.32
Insurance on employees	1,104.74
Depreciation on motor vehicles	499.49
Car Mileage	7,540.00
Promotion	33,464.00
Printed instructions	5,364.36
Miscellaneous supplies and expense	844.20
Advertising - newspapers and magazines	23,019.04
Telephone and telegraph	8,427.23
Dues	684.80
Entertainment	4,927.03
Return Sales adjustment	34.13
Service travel expense	5,355.15
Total Selling Expenses	$219,412.34

Schedule "4"

HOLLY MANUFACTURING COMPANY
SCHEDULE OF ADMINISTRATIVE EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1952

Salaries - officers	$ 47,675.00
Salaries - general office	66,152.28
Travel expenses	384.90
Payroll taxes	2,438.76
Taxes - general	2,290.47
Insurance - miscellaneous	464.69
Insurance on employees	787.85
Depreciation	2,819.51
Stationery, printing and office supplies	10,362.75
Maintenance of motor vehicles	4,483.00
Miscellaneous supplies and expense	2,860.83
Postage	1,666.67
Telephone and telegraph	4,325.63
Obsolescence	45.36
Professional services	5,266.61
Dues	5,684.15
Contributions	19,862.00
Entertainment	472.64
Bad debts	9,000.00
Bonus	80,474.03
Collection expense	296.77
Real estate maintenance	2,442.83
Death benefit payments	8,700.00
Employee meals	236.15
Total Administrative Expenses	$ 279,192.89
Less: Administrative burden relieved	39,537.29
Net Administrative Expense	$ 239,655.60

HOLLY MANUFACTURING COMPANY
SCHEDULE OF ENGINEERING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1952

Salaries	$ 52,700.75
Traveling expenses	412.52
Payroll taxes	1,261.79
Insurance on employees	471.19
Drafting supplies and expense	1,003.11
Car mileage	454.30
Miscellaneous supplies and expense	2,979.08
Professional expenses	1,479.71
Total engineering expense	60,762.45
Less: Engineering burden relieved	7,746.03
Net Engineering Expense	$ 53,016.42

Exhibit "B"

HOLLY MANUFACTURING COMPANY
PROFIT AND LOSS STATEMENT
FOR THE YEAR ENDED DECEMBER 31, 1953

			Percent to Sales
Sales			
Dealers, California	$ 2,324,243.47		71.8
Jobbers, California	296,479.13		9.2
Jobbers, Interstate	667,810.62		20.6
	$ 3,288,533.22		101.6
Less: Discounts allowed	53,602.79		1.6
Net sales		$ 3,234,930.43	100.0
Cost of goods sold			
Standard cost (Schedule "1")	$ 2,013,907.22		62.2
Freight in	30,912.42		.9
Purchase variation	112,538.04		3.5
Material usage variation	9,688.33		.3
Manufacturing cost variation	109,158.62		3.4
Finished goods inventory corrections	(1,498.94)		
Outside labor variation	5,165.62		.2
Total cost of goods sold		$ 2,279,871.31	70.5
Gross profit		$ 955,059.12	29.5
Expenses			
Selling (Schedule "3")	245,070.27		7.6
Administrative " "4")	254,748.10		7.9
Engineering(Schedule "5")	65,593.27		2.0
Total operating expenses		565,411.64	17.5
Net operating profit		$ 389,647.48	12.0
Other income and expense			
Discounts earned	10,683.84		
Interest earned	6,883.46		
Rents received	150.00		
Holly-Coleman joint venture	42,299.67		
Miscellaneous	7.13		
	$ 60,024.10		
Interest paid	(2,444.02)	57,580.08	1.8
Net profit before taxes		$ 447,227.56	13.8
California franchise tax		22,993.77	.7
		$ 424,233.79	13.1
Provision for Federal income and excess profits tax		229,112.39	7.1
Net profit after taxes		$ 195,121.40	6.0

HOLLY MANUFACTURING COMPANY
STATEMENT OF COST OF GOODS SOLD
FOR THE YEAR ENDED DECEMBER 31, 1953

Inventory of finished goods, January 1, 1953			$ 73,098.[illegible]
Cost of Goods Manufactured			
Inventory, January 1, 1953			
Raw Materials	$193,011.00		
Work in process	125,327.00	$ 318,338.00	
Purchases at standard		1,861,810.76	
Manufacturing expense (Schedule "2")	$829.954.66		
Less: Manufacturing cost variation	(109,327.80)		
Adjustments to standard and physical inventory	(2,434.03)	718,192.83	
		2,898,341.59	
Less: Inventories, December 31, 1953			
Raw Materials	$339,828.22		
Work in process	91,888.80	431,717.02	
Cost of goods manufactured			2,466,624.[illegible]
Purchases of finished goods			1,785.3
Finished goods inventory variance			1,498.4
Mark up of finished goods			414.3
Merchandise given away			(378.1
			$ 2,543,043.5
Less inventory of finished goods, December 31, 1953			529,135.3
Cost of goods sold			$ 2,013,907.2

HOLLY MANUFACTURING COMPANY
MANUFACTURING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1953

Supervision	$ 100,676.13
Labor	675,178.06
Payroll taxes	15,843.88
Utilities	13,850.28
Shop supplies	7,456.65
Taxes	25,019.71
Insurance, general	2,553.83
Insurance on employees	21,664.95
Depreciation	56,433.06
Amortization of A. C. A. approval	492.08
Maintenance of motor vehicles	2,711.96
Rental of equipment	11,036.04
Subcontracted labor	664.32
Production supplies	13,422.74
Miscellaneous shop expense	1,131.56
Production tools	6,538.75
Obsolesence	11,487.82
Perishable tools	13,588.43
Material handling	13,951.67
Janitor supplies	2,420.05
Manufacturing service	412.35
Employee relations	4,297.28
Employee recreation fund	1,170.59
Advertising, employment	2,580.64
Office supplies and printing	1,228.80
Traveling expenses	777.32
Supplies for employees	(29.39)
Maintenance of buildings and area	10,669.42
Maintenance of production tools	5,136.01
Maintenance of machinery and equipment	12,510.17
Maintenance of perishable tools	5,757.67
Maintenance of material handling equipment	1,509.59
Maintenance of service machinery	12,317.18
Rent	3,424.40
Total manufacturing expense	$1,057,884.00
Less: Manufacturing burden relieved	227,929.34
Net manufacturing expense	$ 829,954.66

Schedule "3"

HOLLY MANUFACTURING COMPANY
SELLING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1953

Salaries	$ 80,364.57
Service salaries	11,336.15
Manufacturer's agents' commissions	36,141.31
Travel expense	6,666.04
Payroll taxes	1,440.96
Insurance, general	449.32
Insurance on employees	1,239.11
Depreciation on motor vehicles	1,072.32
Car mileage	8,882.03
Printed instructions	3,781.90
Miscellaneous supplies and expense	1,200.80
Telephone and telegraph	8,730.35
Dues	1,142.90
Entertainment	5,335.19
Return sales adjustment	2,678.88
Service travel expense	3,908.47
Promotion - literature and postage	13,032.37
Promotion - contests, shows and conventions	7,307.66
Promotion - visitors to plant	1,217.27
Promotion - displays and miscellaneous	6,149.88
Advertising - direct	21,782.63
Advertising - cooperative	12,141.97
Advertising - telephone listing	6,052.24
	$ 245,070.27

Schedule "4"

HOLLY MANUFACTURING COMPANY
ADMINISTRATIVE EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1953

Salaries - officers	$ 50,040.00
Salaries - general office	114,979.18
Travel expenses	96.82
Payroll taxes	2,546.95
Licenses	573.50
Taxes - general	2,794.18
Insurance - miscellaneous	2,883.02
Insurance on employees	1,516.11
Depreciation	6,333.87
Stationery, printing and office supplies	9,892.83
Maintenance of motor vehicles	2,928.78
Miscellaneous supplies and expense	2,610.08
Postage	2,168.03
Telephone and telegraph	4,222.92
Obsolescence	184.95
Professional services	18,290.21
Dues	5,421.34
Contributions	3,437.36
Entertainment	275.91
Bad debts	9,000.00
Bonuses	64,741.42
Collection expense	1,150.05
Real estate maintenance	12,243.47
Employer meals	520.38
Total administrative expenses	$ 318,829.36
Less: Administrative burden relieved	64,081.26
Net administrative expense	$ 254,748.10

Schedule "5"

HOLLY MANUFACTURING COMPANY
ENGINEERING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1953

Salaries	$ 73,505.38
Traveling expenses	439.08
Payroll taxes	1,032.89
Insurance on employees	945.50
Drafting supplies and expense	1,517.45
Car mileage	314.13
Miscellaneous supplies and expense	3,051.11
Professional expenses	278.00
A. C. A. inspection	2,391.95
Total engineering expense	$ 83,475.79
Less: Engineering burden relieved	17,882.52
Net engineering expense	$ 65,593.27

LAN E & SCHLINGER
ED PUBLIC ACCOUNTANTS
SADENA WHITTIER
CALIFORNIA

Exhibit "B"

HOLLY MANUFACTURING COMPANY
PROFIT AND LOSS STATEMENT
FOR THE YEAR ENDED DECEMBER 31, 1954

	Gross	Returns Rebate and Allowances	Net	
Sales				
Dealers, California	$ 3,020,189.52	$ 123,793.93	$ 2,896,395.59	
Jobbers, California	225,080.57	22,608.43	202,472.14	
Jobbers, Interstate	611,683.65	89,729.44	521,954.21	
	$ 3,856,953.74	$ 236,131.80	$ 3,620,821.94	
Less: Discounts allowed			52,765.97	
Net sales				$ 3,568,055.97
Cost of Goods Sold				
Standard cost (Schedule "1")			$ 2,205,419.45	
Freight in			32,715.65	
Purchase variation			256.36	
Material usage variation			3,008.31	
Manufacturing cost variation			131,466.31	
Finished goods inventory corrections			170.74	
Outside labor variation			129.93	
Returned material variance			5,379.36	
Inventory shrinkage			15,922.27	
Product liability			2,059.78	
Freight out			11,445.68	
Total cost of goods sold				2,407,973.84
Gross profit				$ 1,160,082.13
Expenses				
Selling (Schedule "3")			$ 305,396.60	
Administrative (Schedule "4")			288,757.18	
Engineering (Schedule "5")			146,483.59	
Total operating expenses				740,637.37
Net operating profit				$ 419,444.76
Other Income and Expense				
Discounts earned			$ 8,833.90	
Interest earned			303.56	
Dividends earned			8.75	
Rents received			120.00	
Holly-Coleman joint venture			34,181.11	
Miscellaneous income			451.76	
			$ 43,899.08	
Interest paid			(4,634.80)	
Adjustment expense			(160,000.00)	(120,735.72)
Net profit before taxes				$ 298,709.04
California Franchise tax				17,889.10
				$ 280,819.94
Provision for Federal income tax				140,522.50
Net profit after taxes				$ 140,297.44

.E LANCE & SCHLINGER
FIED PUBLIC ACCOUNTANTS
PASADENA WHITTIER
CALIFORNIA

Schedule "1"

HOLLY MANUFACTURING COMPANY
STATEMENT OF COST OF GOODS SOLD
FOR THE YEAR ENDED DECEMBER 31, 1954

Inventory of finished goods, January 1, 1954			$ 529,135.93
Cost of Goods Manufactured			
Inventory, January 1, 1954			
Raw materials	$ 339,828.22		
Work in process	91,888.80	$ 431,717.02	
Purchases at standard		1,740,804.82	
Manufacturing expense (Schedule "2")		724,403.10	
Less: Manufacturing cost variation		(134,562.35)	
Adjustments to standard and physical inventory		(16,022.27)	
Used for displays and advertising		(840.47)	
Material scrapped		(3,033.88)	
		$ 2,742,465.97	
Less: Inventories, December 31, 1954			
Raw materials	$ 351,566.10		
Work in process	113,793.75		
Returned material	2,067.02		
Merchandise in transit	22,386.62	489,813.49	
Cost of goods manufactured			2,252,652.48
Purchases of finished goods			1,628.48
Finished goods inventory variance			(170.74)
			$ 2,783,246.15
Less: Inventory of finished goods, December 31, 1954			577,826.70
Cost of goods sold			$ 2,205,419.45

Schedule "2"

HOLLY MANUFACTURING COMPANY
MANUFACTURING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1954

Supervision	$ 91,506.10
Labor	445,992.65
Payroll taxes	13,054.62
Utilities	14,482.81
Shop supplies	4,831.30
Taxes	33,584.46
Insurance, general	3,337.02
Insurance on employees	19,243.55
Depreciation	61,658.88
Rent	15,188.55
Maintenance of motor vehicles	2,375.68
Rental of equipment	10,943.77
Production supplies	10,291.10
Miscellaneous shop expense	377.76
Obsolescence	957.98
Perishable tools	12,121.05
Material handling	9,602.30
Janitor supplies	2,165.25
Employee relations	3,491.00
Employee recreation fund	2,192.66
Advertising, employment	673.50
Office supplies and printing	1,256.87
Traveling expenses	513.75
Supplies for employees	(40.73)
Maintenance of buildings and area	2,932.30
Maintenance of machinery and equipment	8,127.35
Maintenance of perishable tools	2,760.20
Maintenance of material handling equipment	1,875.24
Maintenance of service machinery	4,726.24
Manufacturing aids	50.90
Total manufacturing expense	$ 780,274.11
Less: Manufacturing burden relieved	55,871.01
Net manufacturing expense	$ 724,403.10

PYLE, LANCE & SCHLINGER
CERTIFIED PUBLIC ACCOUNTANTS
PASADENA WHITTIER
CALIFORNIA

Schedule "3"

HOLLY MANUFACTURING COMPANY
SELLING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1954

Salaries	$ 127,360.69
Service salaries and wages	3,957.02
Manufacturer's agents' commissions	23,742.48
Travel expense	18,186.54
Payroll taxes	2,324.00
Insurance, general	448.16
Insurance on employees	2,662.91
Depreciation on motor vehicles	1,359.90
Car mileage	12,987.66
Transportation expense, other	5,512.27
Printed instructions	267.50
Miscellaneous supplies and expense	1,584.69
Telephone and telegraph	11,220.26
Dues	1,221.09
Entertainment	2,178.52
Return sales adjustment	14.70
Service travel expense	73.41
Promotion - literature and postage	18,578.09
Promotion - contests, shows and conventions	6,559.11
Promotion - visitors to plant	2,320.19
Promotion - campaign	3,271.82
Promotion - displays and miscellaneous	8,798.12
Advertising - direct	32,438.57
Advertising - cooperative	9,707.82
Advertising - telephone listing	8,621.08
Total selling expenses	$ 305,396.60

Schedule "4"

HOLLY MANUFACTURING COMPANY
ADMINISTRATIVE EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1954

Salaries - officers	$ 54,840.00
Salaries - general office	101,403.14
Travel expenses	1,202.95
Payroll taxes	2,687.31
Licenses	221.24
Taxes, general	3,740.71
Insurance, miscellaneous	3,867.49
Insurance of employees	2,473.69
Depreciation	7,542.38
Stationery, printing and office supplies	8,651.84
Maintenance of motor vehicles	4,951.04
Miscellaneous supplies and expense	2,818.50
Postage	2,467.12
Telephone and telegraph	5,420.02
Professional services	31,144.26
Dues	5,699.70
Contributions	3,611.05
Entertainment	242.56
Bad debts	6,750.00
Bonuses	66,419.77
Collection expense	869.41
Real estate maintenance	530.47
Employee meals	284.17
Total administrative expenses	$ 317,838.82
Less: Administrative burden relieved	29,081.64
Net administrative expense	$ 288,757.18

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CALIFORNIA

HOLLY MANUFACTURING COMPANY
ENGINEERING EXPENSES
FOR THE YEAR ENDED DECEMBER 31, 1954

Salaries	$ 114,249.45
Traveling expenses	185.57
Payroll taxes	2,430.72
Insurance on employees	2,812.92
Drafting supplies and expense	1,091.80
Car mileage	581.23
Miscellaneous supplies and expense	2,580.44
Professional expenses	1,288.25
A. G. A. inspection	6,656.50
Tools and tooling equipment	17,592.92
Tooling maintenance and materials	5,145.80
Total engineering expense	$ 154,615.60
Less: Engineering burden relieved	8,132.01
Net engineering expense	$ 146,483.59

TOPICAL INDEX

INDEX TO APPENDICES

(Under separate volume)

TABLE OF AUTHORITIES CITED

Cases

Statute

No. 16141

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

The Coleman Company, Inc., a corporation,

Appellant,

vs.

Holly Manufacturing Company, a corporation,

Appellee.

REPLY BRIEF OF DEFENDANT-APPELLANT THE COLEMAN COMPANY, INC.

A comparison of the topical indices of Coleman's opening brief and Holly's brief will reveal that instead of attempting a straightforward reply to Coleman's contentions (seriatum or otherwise), Holly's brief is largely devoted to a shotgun presentation of its own contentions and accusations. Coleman's reply is further burdened by the fact that Holly now denies, in this Court, matters which it did not and could not deny in the court below. For these reasons, it has been necessary to expand the usual scope of a reply brief and to spell out from the record previously undenied facts. At the same time, it is utterly impossible, even within the liberal enlargement accorded us by this Court, to cover all of the numerous contentions advanced in Holly's brief. Instead, we have been forced to select Holly's principal arguments—those which should prove determinative of this appeal—and to confine this brief to a refutation thereof.

One further introductory note is in order. All Holly need do to sustain the judgment below is to direct attention, when it can, to evidence which supports it. It does not do so by denunciation of Coleman and its counsel. Coleman has not repeatedly changed counsel as Holly irrelevantly charges. Save for the employment of special Washington, D. C. counsel to assist in the former certiorari proceedings, there has been but a single change in counsel, occurring when the undersigned were substituted for Messrs. Lyon and Lyon. Mr. Tilton is a partner of Mr. Dawson's in the firm which was Coleman's patent counsel for many years before this litigation, and still is. The firm of Foulton, Siefkin, Schoeppel, Bartlett & Powers has been Coleman's general counsel since its incorporation, and still is. Coleman appears in this Court in the firm belief that it is the victim of a miscarriage of justice, and stands upon the record as to whether it has grounds for relief here or whether it is, as Holly maintains, pursuing a frivolous appeal to vex and delay.

SUMMARY OF HOLLY'S CHIEF ARGUMENTS, AND REPLY THERETO.

1. Claim That Coleman Seeks to "Retry the Whole Case."

Coleman has conceded as clearly as possible that it is not entitled to a readjudication of the issue of infringement (Op. Br. pp. 2, 10). But after that adjudication three new issues arose, not previously before any court, and now presented by this appeal: (1) did Coleman's *modified* heater infringe so that Coleman was in contempt, (2) what damage did Holly suffer or to what royalty was it entitled, and (3) did Coleman act in bad faith? On the trial of each, the question of what Coleman did, other than to infringe, was necessarily triable and to be

decided. In the process, factual errors in the original evidence could not be concealed but had to be considered, not to undo the adjudication which had been made but to decide the new questions before the Court.

2. Holly's Denial That Its Original Evidence Was Proved to Have Been Mistaken.

It was a proved and uncontested fact at the contempt and accounting trials that Holly's original evidence that Coleman's economizers used from 23% to 57½% of infringing air was grossly erroneous (Op. Br. p. 9 *et seq.*; p. 47 *et seq.*). Holly's present and belated denial of this revelation, which denial was not made in the Trial Court, is made either because the writer of Holly's brief, being an attorney who was not present when the truth was shown, has misread the record, or because Holly must by some means persuade this Court to overlook it. *Holly must do this because the evidence it originally introduced as to the functioning of Coleman's heater is all the evidence it ever introduced on that subject.* After the overlooked air passage was revealed it was no longer possible for Holly to show that Coleman utilized any appreciable quantity of infringing air, and Holly must stand or fall on the evidence it had already given before Coleman exposed the error. Thereafter Coleman's heater could no longer be made to yield the kind of data by which Holly originally prevailed.

Because of the baseless denial now made, it is necessary to spell out the facts from the record, with reference also to the different kind of response Holly made in the Trial Court when the truth was shown.

As previously quoted (Op. Br. pp. 47-50) Holly's original evidence, given by Mr. Landsberg, assumed that there were only two sources of economizer air, one in-

fringing and the other non-infringing. By deducting the latter from the total, he thought he had found the volume of infringing air. If there was another source of non-infringing air, overlooked, Landsberg's conclusion was inevitably invalidated, as he admitted—not in the qualified sense suggested by Holly's partial and misleading quotation (Br. p. 22), *but absolutely.*[1]

There was such an overlooked source. Holly admits that it was referred to as "brown" air (Br. p. 81).[2] The "brown" air traveled *inside* the lower box [R. 503] and was therefore non-infringing. The volume of that air which reached the economizer was visually demonstrated under circumstances precluding Holly's now attempted denial. Before the demonstration was made by means of smoke wands applied by Alwin Newton, a Coleman vice-president, the Court announced that if Newton said he saw something which was disputed, the dispute should be noted.[3]

Holly's technical advisor and inventor, Mr. Hollingsworth, was present and made numerous comments as the

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[1]In the very next question and answer following Holly's partial quotation, Landsberg admitted that his conclusion would be completely nullified by the existence of another, overlooked air passage, and that he would not be able to tell at all where the air came from [R. 558-559; Op. Br. 49-50]

[2]Holly there says that it was "brown" and "green" air, but Coleman has never relied upon the "green".

[3]"The Court: If Mr. Newton says he sees something that you gentlemen dispute his seeing, or at least you don't see it, you may so indicate on the record at the time.

"Mr. Stanbury: Fine. I would appreciate that.

"Mr. Christie [representing Holly]: Since Mr. Hollingsworth is probably more familiar than the rest of us, would it be all right if Mr. Hollingsworth interjects a comment as we go along if he sees anything that he differs with?

"Mr. Stanbury: I certainly don't object. I wish he would." [R. 599-600].

smoke was emitted from the economizer, first with the modifying chute installed and thereafter without it.

With the chute installed, Newton described the volume of "brown," non-infringing, air as being between *three and four* times as great as that of the "pink," infringing, air [R. 605, 603-605]. This was as the Court watched, and Hollingsworth made no comment. This large volume of non-infringing air was erroneously included in the Landsberg computation of *infringing* air because he did not know of the passage.[4]

Without the chute, and thus with the heater in its original, unmodified condition, there was *at least as much* air passing into the economizer through this non-infringing "brown" passage as through the infringing "pink" passage [R. 631-633]. Thus at least as much non-infringing as infringing air had erroneously been included in Landsberg's original and basic computations, as appears below: with the smoke in the "brown" channel, Newton claimed that there was more air passing through it than through the "pink," but Hollingsworth disagreed, stating that he would not agree that the "brown" was *more* than the "pink." The demonstration was repeated. Then:

> The Court: What is your comment, Mr. Hollingsworth?
>
> Mr. Hollingsworth: I see no visible difference between the amount of smoke emitting now [smoke in "pink" area] as compared with the last run with the wand in the brown area [R. 634].

This admission that the volume of "brown" air was equal to the volume of "pink" air, and the prior admission

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[4]R. 31-33, affidavit on contempt hearing, in which he says he made same test as previously.

by silence that with the chute installed the volume of the "brown" air exceeded the "pink" by three or four times, are in strange contrast with Holly's present attempt to deny that there had been any error or oversight at all.

It is also significant to note what Holly said about these demonstrations *while Holly was still before the Trial Court*. The very next morning Mr. Christie argued in its behalf [R. 698 *et seq.*]. There was no denial, then, that the "brown" air passage had been overlooked. His comment was only that there could not be much importance to the passage because Coleman had not mentioned it before, either at the trial or on motion for new trial [R. 707-709].

But Holly's oversight, with or without Coleman's failure to demonstrate it, does not alter the physical fact that the air passage does exist and that it thus upsets Holly's earlier calculations. Nor can this physical fact be affected by the fact that, as argued in Holly's brief (22), Mr. Kice, representing Coleman at the original trial, stated there was no passage corresponding with the "brown." A new issue, never previously before the court, was being tried at the time this disclosure of the truth occurred: Did Coleman's *modified* device infringe?

Following Mr. Christie's argument, counsel for Coleman argued and characterized the demonstration as having been completely destructive of the Landsberg data, summarizing the latter as "absolutely farcical" [R. 748-749]. Although Mr. Christie replied immediately, *he did not attempt to refute Coleman's contention;* in fact, he made no reference whatever to the Landsberg testimony [R. 760 *et seq.*].

In argument of an objection by Holly to the receipt of evidence at the accounting trial before the Special

Master, as to the contribution, if any, of Holly's air to the Coleman heater, Coleman's counsel said

> ". . . the original decision was based upon data which is now known to be sadly erroneous, and, according to undisputed testimony—*if there is any contradiction the plaintiff can introduce it,* but up to now it hasn't been introduced at all—it was on data that was mistaken because the inside source of non-infringing air was overlooked by both sides, and the formula used by Mr. Landsberg included non-infringing air with the infringing air" [R. 1506].

No such evidence was offered by plaintiff, and in the final argument before the Special Master Mr. Hoegh, then arguing for Holly, passed over the matter lightly with the comment that "if there were any errors that could have crept into that" (the original) "proceeding, I am sure that Mr. Newton would have caught them at that time" [R. 1847]. (But Mr. Newton did not participate in the original trial).

Nowhere in any of Holly's written or oral argument in the Trial Court was there any suggestion of the type of denial which Holly now makes in the evident belief that the relative remoteness of an appellate court, and the indirectness of a printed record, gives it immunity or will make it difficult for Coleman to show the truth.

Holly now repeatedly asserts that the Trial Court saw the demonstration and disregarded it. The opposite is true. Although every other finding of fact was adverse to Coleman, this one was not. Whereas the Court had previously found that from 23% *upward* of the air in the economizers was *infringing* air, it concluded after receiving visual evidence to the contrary that *20%* of the air was *a combination of "brown, green and pink" air,* and

that the question was what *part* of this mere *"one-fifth"* of the economizer's air was infringing [R. 734, 766].

The record fortunately enables us to go much further than this. In final refutation of Holly's baseless denial that its previous evidence was shown to be erroneous, and of its false and inconsistent claim that after witnessing the demonstration of the error the Trial Court dismissed it from consideration, the truth is that the following occurred:

> Coleman's counsel: There is absolutely no evidence in this record as to how much pink air or infringing air there is in the economizer except that it does not exceed three per cent.
>
> The Court: *I guessed six.*
>
> Mr. Stanbury: You guessed six. That's remarkably close, Your Honor. At the time the court guessed six I couldn't figure out where that six came from. But its remarkably close for an offhand calculation because data was not in Mr. Landsberg's testimony [R. 1865].

Contrast this with Holly's present position. When it was before the Trial Court, which had itself witnessed the expose which Holly now denies ever occurred, it did not deny that it had occurred. Nor did it pretend, as it now does, that the Trial Court had seen and dismissed Coleman's demonstration as of no consequence. In the argument made by Holly's counsel *immediately following* the foregoing significant comment of the Trial Court [argument commencing at R. 1996] there was no denial or dispute of what had happened, since the Trial Court, unlike this one, had seen what had happened.

Also, Holly argues *here* that after the disclosure of the previously overlooked passage Landsberg made more tests allegedly still showing that an important volume of in-

fringing air was utilized. This claim, also disproved by the record, is discussed in the following section. But relevant here is the fact that in making later tests Landsberg taped shut the "brown" passage.[5] If, as Holly belatedly claims, there was no such passage, *how did Landsberg close it?* If there remains in the mind of this Court any question that Holly may be correct in now denying the existence of this air passage, which all of its data overlooks, it can easily be demonstrated for the Court's own observation.

Lastly, Holly repeatedly attempts to make it appear that the new evidence was old evidence and that the Trial Court had considered and rejected it when it found infringement (Br. pp. 24,[6] 25, 78, 90-91, 98). Newton is misleadingly quoted as referring to an old record when he testified as to the percentage of air, and Coleman's counsel is quoted as stating that "this is not new evidence" (Br. 25), when it was perfectly clear that reference was made to, and only as far back as, the contempt trial and not to the original trial. Needless to state, Holly's counsel did not tell the Trial Court, which had seen it, that the new evidence was old.

3. Claim That Landsberg's New Tests, Made After He Discovered the Previously Overlooked Air Passage, Also Showed a Substantial Use of Infringing Air.

Holly now argues that after Landsberg's attention was called to the previously overlooked passage he made more tests showing substantially the same results over again.

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[5]R. 647, referring to the "brown" area as the "scoop".

[6]Where Holly says "the same unreliable smoke tests were presented at the original trial. . . ." No tests showing the passage of air through the "brown" area were ever shown prior to the contempt hearing.

No such argument was ever made in the Trial Court because it was there conceded that the method Landsberg used invalidated his results. What Mr. Landsberg did was to tape off the "brown" air passage (non-infringing air) while measuring the air flow in the others. But admittedly (below) this cannot be done without disturbing the air flows in the heater, causing the air, or some of it, which would normally ascend the occluded passage to go up one of the others through increased velocity. Hollingsworth himself admitted this, although stating that not *all* of the air would find another passage:

> Mr. Stanbury: But when you cut off one source, such as what goes through the scoop, that quantity is coming from somewhere else and made up either in velocity or volume or both, isn't it? It is going to come from somewhere else to supply what used to come from the scoop?
>
> Mr. Hollingsworth: That is true, but it will not be in direct proportion to the amount that came through the scoop in the first place.
>
> Mr. Stanbury: You say it would not be?
>
> Mr. Hollingsworth: No. sir.
>
> Mr. Stanbury: It might be more or less?
>
> Mr. Hollingsworth: It would always be less. [R. 674].

This was clear to the Trial Court, which volunteered comment to the same effect:

> The Court: You close off two of the three, or one of the three, and *I would be very surprised if most of what ordinarily goes through the three wouldn't travel up the two*—It probably means that 5/6 of the brown area that normally would follow the brown course went up the pink and green course. [R. 752, 753].

Even Landsberg admitted that his new tests had not segregated *infringing* from *non-infringing* air:

> Mr. Stanbury: In other words, Mr. Landsberg, the test that we have witnessed this morning[7] is on exactly the same principle as the tests you made prior to 3:00 o'clock yesterday afternoon?[8]
>
> Mr. Landsberg: Yes, sir.
>
> Mr. Stanbury: You have not segregated the brown from the green or the green from the pink or the pink from the brown?
>
> Mr. Landsberg: Right. [R. 684].

Landsberg's own data showed the result of upsetting the air current. When he taped shut the "brown" passage, the "pink" and "green" gave him a reading of 14.4% [R. 648-649, referring to the "brown" as the "scoop area"]. But when he left the "brown" passage open he got only 15.6% from all *three* passages, a differential of only *1.2%* to be attributed to the "brown" [R. 649-650]. Contrast this with the 6% attributed by the Court to the "brown" [R. 766] and relied on in Holly's brief (85).

(There is no basis in the record for the Court's apparent computation of 6% for the brown air. It could have been premised in whole or in part upon Landsberg's later tests, for 6% is the difference between Landsberg's 14.4% for the pink and green (above) and 20%; but it is not known whence the 20% base was derived since Landsberg's total for the three passages was 15.6% (above), not 20%. But we are not assuming that the Court, after commenting upon the fact that sealing off one passage, as Landsberg did, would cause the air to seek one of the other passages,

---

[7]The new tests.

[8]The old tests, now undeniably worthless.

nevertheless accepted Landsberg's conclusions as the basis of any computation. Apparently what the Court meant to say was that the *"pink"* infringing air, not the "brown," was 6%, for that is what the Court later said that it had concluded [R. 1865]. It is immaterial which, since either is entirely inconsistent with Holly's deceptive claim that the Court considered and *rejected* the evidence showing that the prior, radically different, calculations were wrong.)

Landsberg did not make any tests, after learning of the "brown" air source and thus of the true function of the heater, in which he made any allowance for the overlooked passage so as to compute the quantity of infringing air in the economizers. The truth is that thereafter Holly found it impossible to show that a significant quantity of such air existed, and necessarily chose instead to rely upon its original data, pretending in the Trial Court, ostrich like, that the overlooked passage was unimportant merely because it had once been overlooked, and here, that no such disclosure was ever made.

4. Claim That Coleman Acted in Bad Faith.

Following, in the same numerical order, are the items Holly relies on to show bad faith (Br. pp. 87-97), set forth here as quick proof that there was no bad faith:

1. That Coleman "deliberately copied the Holly heater." In support, Holly merely cites the opinion of this Court delivered on the prior appeal when the issue of bad faith was not before it. Now that the issue has been tried, it is known that Coleman, through Olds, found it imperative to avoid Holly's principle, and could not understand how such a heater could have received A. G. A. approval, a mystery still unsolved so far as Coleman is concerned (Op. Br. p. 54). The Patent Office considered

Coleman's heater to be an original invention and granted a patent thereon (Op. Br. p. 65). Actually, this contention is duplicative of Holly's fourth *"res judicata"* assertion which is covered in (4), below.

2. That Coleman's president told Olds to go ahead, and he would take care of the matter of infringement. Giving full credit to this testimony by the discredited witness Olds, it shows no intent to infringe. Olds' contemporaneous writings showed his conviction, firmly held and manifestly expressed by him to Coleman's president before the product was sold, that there was no infringement (Op. Br. p. 54), and Coleman and perforce its president were also so advised by patent counsel (Op. Br. p. 62).

3. That Coleman applied to Holly for license, was refused, but nevertheless proceeded, thus evidencing an opinion that it infringed. At that very time Olds wrote his opinion that Coleman's heaters "definitely did not infringe," but in the same writing referred to a possible royalty respecting Holly upon the ground that Coleman "would rather support patents than attempt to destroy them" (Op. Br. p. 58). Also, since Holly's counsel had already threatened suit, a license would have avoided the expense of litigation.

4. That it is *res judicata* that Coleman's infringement was "willful, intentional and deliberate"—an assertion made throughout Holly's brief (pp. 1, 9, 11, 17, 39, 88, 98). But this is an assumption based by Holly upon a statement in this Court's opinion, when the question of good or bad faith was not involved, and which, in turn, was a quotation from the trial court's original decision, rendered when it did not have that issue before it. Note, in this connection, that the Trial Court itself acknowl-

edged, even after the contempt trial and at the very end of the proceedings below, that it had not yet passed upon the good faith issue [R. 1939]. Also, when the Trial Court made its findings it did not purport to base it on any prior decision. See, too, the extended discussion between the Court and Holly's counsel regarding Holly's request for attorney's fees, occurring just before final submission of the proceedings below [R. 1996-2002], where the judge plainly stated that under the "drive-in theater case" he would be forced to deny Holly's request unless and until he was able to, and did, brand Coleman guilty of bad faith. [*e. g.* R. 1997, 2002]. And observe that even then—during the final arguments following the Special Master's Report—Holly's counsel was attempting to *demonstrate* bad faith, without suggesting that this question was already *res judicata.*

At all events, in our opening brief we demonstrated and buttressed with the citation of abundant authority the fact that nothing is *res judicata,* or becomes the law of the case, unless the same issue has previously been decided, and that the good faith issue was nor presented to or decided by the Trial Court (or, *a fortiori,* by this appellate court) prior to the accounting trial below.

Holly avoids any attempt to refute or meet this point in its brief. It merely cites *Bristol Laboratories v. Schenley Laboratories,* 117 Fed. Supp. 67, S. D. Ind.; but that case never mentioned or even involved the question of *res judicata.* In fact, the opinion there merely found the patent valid and infringed, ". . . the question of such intentional willful and deliberate infringement being reserved for further consideration by the Court in connection with an accounting to be had in this matter" (117 Fed. Supp. at p. 81). For the reasons stated in our opening

brief (pp. 67-70) it is submitted that there is no shred of merit to Holly's constantly repeated assumption of *res judicata.*

5. That Coleman or Dawson was careless. There was no negligence: Olds knew exactly what he was doing, found Holly air ruinous to the heater, and was convinced there was no infringement (Op. Br. p. 54).[9] Dawson undeniably assumed there would be an inconsequential air leakage (Op. Br. pp. 62-63). The only negligence was Kice's at the original trial when he failed to expose Holly's error, and Kice was replaced. (It is of interest that Holly, which produced the erroneous evidence that Kice failed to expose, assumes no responsibility, but suggests that it was Kice who "misled the court" (Br. p. 80).)

6. That after formal notice, Coleman represented that it would change its heater without doing so. Coleman did change its heater, and its patent counsel advised Holly that in his opinion there was then no infringement (Op. Br. pp. 62-63).

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[9]This conviction was based on an examination of the Patent Office records (Op. Br. pp. 52-54). Holly (Br. 30) makes a *pro forma* denial without documentation that Coleman's interpretation of these records was incorrect. However, the testimony of Coleman's expert witness on this matter is uncontradicted [R. 1772-1778]. In the first Hollingsworth application, where only one (Claim 10) of the original ten claims mentioned the feature of supplying lower wall space air to the secondary heater, the claims were rejected over the prior art [Trial Ex. A, pp. 8-10, 13-14]. In the second Hollingsworth application, two of the claims (Claims 3 and 4) specified this feature [Trial Ex. B, pp. 14-15]. The Patent Office Examiner then again rejected all the claims, but stated: "A claim clearly defining the structure to which claims 3 and 4 are directed will be favorably considered" [Trial Ex. B, pp. 28, 27-28]. Thereupon Holly cancelled all claims and presented the claims contained in the issued patent, *each of which* specifies that the secondary heater (economizer) has "an inlet opening adjacent to the bottom thereof to receive air flowing upward outside the first box and inside of the wall." [Trial Ex. B, pp. 30-32].

7. That Coleman improperly installed heaters for *inter partes* tests at Wichita in connection with the original trial. This contention is too irrelevant to the bad faith infringement issue to warrant a reply.

8. That Coleman has been "stubbornly litigious" and has burdened Holly with "protracted, vexatious, and expensive litigation." Having the record of this case before it, this Court is well able to judge the untenability of this assertion.

9. That Coleman withheld records relevant to the accounting. But Coleman's records were called for and produced before the Special Master, who expressly found that the parties had been "very cooperative" and that Coleman had allowed Holly to examine its books except parts which were "confidential in nature and not necessary for the fixing of damages" [R. 54]. Holly made no such claim below. Also: that Coleman failed to keep separate records of the "profits made from the infringement." This is a unique and newly advanced basis for punitive damages! Coleman's normal business records were produced.

10. That Coleman sought to retry the infringement issue at the accounting trial. As noted above, this is not true, and no evidence not considered material by the Special Master was received at that trial.

11. That in the argument before the Special Master and the Trial Court, Coleman's counsel represented old evidence as being new evidence (Br. p. 90). At another point Holly says that the evidence referred to as new was the "same unreliable smoke tests which were presented at the original trial" (Br. p. 24). Yet the tests referred to were shown for the first time at the *contempt* hearing.

These statements are evidently part of Holly's present strategy of denying that Landsberg's data was ever shown to have been erroneous (Sec. 1, above), for they are inexplicable on any other basis. It was clear to all that Coleman's counsel, when referring to new evidence, was referring to evidence which was new *since the original trial.* Also, that when at the *accounting* trial he said "this is not new evidence" he was referring back to the *contempt* hearing (the contempt decree being here on appeal *for the first time*) and no further. Certainly such statements by Coleman's counsel, which were true, are irrelevant to the subject of Coleman's good faith. The evidence referred to as new evidence was new evidence. Holly's grasping at such a straw suggests the poverty of the record on the bad faith issue.

12. Again, that Coleman is attempting to relitigate the infringement issue, and a recurrence of Holly's present pretense that there was no disclosure of its prior error. This has been discussed in a preceding section.

13. and 14. That Coleman is maintaining the *other* case before this Court (*Siegler v. Coleman* No. 16154) to vex and annoy, an assumption which cannot justifiably be made, *a fortiori* before that appeal has been heard by this Court. Furthermore, since that case was started by Holly (its successor, Siegler), and not by Coleman, the contention is that it is bad faith on "our" part for "them" to sue "us."

Lastly, Holly argues elsewhere (Br. pp. 94-96) that Coleman's Giwosky patent has no significance in showing Coleman's *good* faith, for various irrelevant reasons: *(1)* No patent was applied for until after Holly's, and after Coleman had seen the Holly heater. (The Patent Office granted Coleman a patent over the citation of Holly's as

prior art.) *(2)* Coleman put its heater on the market nearly a year before it applied for its patent. (The law allows a patentee a year after he markets his product before applying for his patent.) *(3)* The District Court has held that Coleman's patent is invalid. (That decision, made on motion for summary judgment, is on contemporaneous appeal, and Holly's assertion begs the issue of that appeal.) *(4)* Coleman did not follow its patent by taking its economizer air directly from the room, but took it from the wall spaces. (The evidence clearly shows that *except for leakage* Coleman *did* take its air directly from the room. Holly's original erroneous evidence was refuted when the present issue of damages was tried, and Holly produced no additional evidence after its attention was called to the air source it has overlooked. Neither Holly's nor Coleman's patent excludes the possibility of leakage from the source prescribed by the other.) *(5)* Coleman did not mark its heater with its patent number. (No law required it to.)

The foregoing summary of the evidence Holly relied on to show bad faith indicates why the Special Master, who heard the witnesses, found that Coleman had acted in good faith.

Since the record cannot support but affirmatively rebuts the Trial Court's finding of bad faith, the judgment awarding punitive damages and attorney's fees must be reversed—see authorities compiled at pages 44-45 of Coleman's opening brief.[10]

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[10]On page 92 of its brief Holly cites three cases for the assertion that as to attorney's fees an award may be justified "by even less showing of unfairness or bad faith than is required to justify an award of punitive damages". The three cases there cited hold no such thing, nor do they even announce such a principle by way of dictum. They are merely instances where, under the special cir-

5. Claim That Holly Is Entitled to Damages Based Upon Assumption It Would Have Made Substantially All of Coleman's Sales but for the Infringement.

Holly distorts Coleman's argument so as present itself with a vulnerable target. Thus, Coleman is repeatedly said to contend that Holly was required to show that it would have made "each and every one" of Coleman's sales but for the infringement, and to prove its loss "with absolute certainty" (Br. pp. 15, 48, 51).[11] Holly actually states that "throughout the accounting" Coleman made this contention (Br. p. 15), although nowhere in Coleman's brief or oral argument can be found any such contention. But even Holly admits the following requirement: that the evidence must show that *"in all probability*

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cumstances present, the court saw fit to allow attorney's fees but not to assess punitive damages against a defendant whose wanton conduct could have sustained either or both types of awards. Holly might as logically have cited cases where, upon a finding of bad faith, the court awarded punitive damages equal to twice plaintiff's actual losses, and argued therefrom that *double* damages may be awarded on evidence which won't sustain a decree of *treble* damages. At all events, as demonstrated in Coleman's opening brief (pp. 44-45), neither punitive damages nor attorney's fees may be awarded unless the infringing defendant is *first* properly adjudged guilty of wantonness or bad faith; and once this finding is justifiably made, then the court is invested with discretion to award attorney's fees and punitive damages, *either or both.* In fact, if there be any distinction between degrees of wantonness which will sustain an award of attorney's fees as distinguished from punitive damages, this Court's recent decision in *Elric Rim Co. v. Reading Tire Machinery Co., Inc.* (decided March 4, 1959) suggests that at least as much proof of fraud is required for the former. There, although the trial court awarded attorney's fees to plaintiff on a finding that defendant's infringement was "willful, deliberate and intentional" and done without reasonable grounds for thinking plaintiff's patent was invalid, this Court reversed the judgment for the reason that the factual findings would not sustain the attorney's fee award.

[11]Although Holly claims that Coleman has made this contention throughout the proceedings, Coleman expressly stated that it did not do so [R. 1947].

the injured party would have made the sales which the wrongdoer made" (Br. p. 52).

Coleman does not complain because Holly did not trace "each and every one" of the sales it claims it lost, but because it did not show a *single* lost sale, nor any circumstance whatsoever from which it might be inferred that Holly would have made substantially all, or even any appreciable portion, of Coleman's sales but for the infringement. It will be remembered that the judgment assumes Holly would have made *all* of Coleman's sales. Not only was there no basis for such assumption in the first place, but any validity it might have had as a guess is invalidated by the actuality.

What happened before and after infringement provides a laboratory test control, excessively favorable to Holly because it ignores all other factors (besides infringement) which would cause fluctuations in business. Yet even with this unreasonable assumption, Coleman's share of the national market scarcely varied at all, before, during, or after infringement (Op. Br. pp. 33-34). And Holly's maximum variation in any one year (1953) as computed by the Master was 5.4% [R. 50], as contrasted with Coleman's quite constant 11% (Op. Br. pp. 33-34). Even the 5.4% figure is misleading in Holly's favor because this maximum variation occurred in 1953 [R. 49, 50; Op. Br. p. 28], a year in which the causes of Holly's slight recession are known and were admittedly *other than infringement*.[12] Except for that year, the maximum variation was

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[12]Holly's vice-president testified that reduced sales in 1953 were caused primarily by steel shortage, resulting sales allocation program, and limited plant capacity [Orig. R. 468-470]. Of the sales allocation program he said: "We set up rather elaborate mechanics for handling it through our sales office, and it remained in effect during the first half of that year, and of course drastically affected

2.3% (*ibid.*). Holly had 19.1% of the market when infringement began, 20% after it stopped, and from 17.5% to 18.8% throughout the infringement except for 1953. Coleman had no corresponding gain. It is altogether impossible that Coleman's sales can be taken as a measure of Holly's damages.

The foregoing evidence has been reviewed not to show that Holly should have been awarded damages based on the fluctuations, but because what actually happened is further proof of the unreasonableness of the assumption upon which the judgment is based. Holly depicts Coleman as an "intentional tort-feasor" who wrongfully claims the right to retain the "fruits of its wrong-doing" and to pay only a royalty therefor (Br. p. 38). Coleman has never denied liability for any damages actually sustained, but damages must certainly appear from evidence and cannot be presumed from infringement alone, as Holly seems to believe despite the fact that no case supports its position.[13]

Holly contends that the *Livesay* case is directly in point and that it controls the disposition of the present case. This assertion overlooks the fact that the lost sales dam-

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our sales effort through the year, for we were doing the very reverse of selling for at least half of the period" [Orig. R. 470]. Coleman's competition was mentioned only as an afterthought, thereafter [Orig. R. 470], together with the competition of other companies. *These admitted facts made it fantastic that the lower court could have awarded Holly all of Coleman's 1953 sales.*

[13]All the cases cited in Holly's brief are easily distinguished. (See Coleman's Op. Br. pp. 34-37.) The *Livesay* case which Holly claims is the closest on its facts is discussed in the text immediately following this note. The only new case cited by Holly is *Graham et al. v. Geoffrey Mfg. Inc., et al.,* 253 F. 2d 72 (5th Cir., 1958). This decision obviously does not support the awarding of profits without clear proof of lost sales. In the *Graham* case both parties admitted that the patent owner would have made the sales except for the infringement, as the court states: "Nor is there any real dispute that appellants would have sold substantially all of these plows, but for the action of appellees."

ages in the *Livesay* case were established by two elements of proof which are missing here. In the *Livesay* case the evidence showed respecting the product in question (a monolithic window frame with a Venetian blind guide) "that over 95%[14] were manufactured and sold by these two parties, Infringer and Licensee." It was also shown that "as to all of the residences comprising the 95% with built-in-blind guides which went to make up the combined volume of Infringer and Licensee, the builder, or contractor, or architects called for this type of frame." Consequently, as pointed out by the court, "the source of supply was confined to these two parties" (251 F. 2d 469).

In an evident attempt to analogize its situation to that involved in the *Livesay* case, Holly refers (Br. pp. 58, 59, 64) to testimony of its own witnesses (who presumably did not understate the facts) that "some" of its literature contained an A. I. A. file number so architects could, *if they cared to,* use it in their specifications (Br. p. 58), and that *sometimes* ("in many instances," Br. p. 58) its heaters were sold under architectural specifications for wall heaters with secondary heat exchangers. This, though, falls far short of demonstrating that most or even any substantial number of its sales were effected in this manner. In any event, moreover, this would be wholly immaterial *unless it were also established that Coleman heaters were used to meet such specifications,* as was true in *Livesay.* There was no such evidence.

Holly also contends that the *Livesay* decision supports it because Holly's heaters were not in direct competition with wall heaters manufactured by anyone but Coleman

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[14]The figure "95%" is misprinted as "9.5%" in the quotation on page 35 of Coleman's opening brief.

(Br. pp. 60-64), thus attempting to bring the instant facts within those of the *Livesay* case by showing a limited market served by only these two parties.[15] Holly offered no evidence whatever to show such limited competition, or even a public awareness of so limited a classification of wall heaters, and could not possibly have done so. Holly could not even show that Coleman ever advertised or referred to any of the alleged "sales features" which Holly stresses (Br. p. 61).[16] The true competitive situation, moreover, was told by Holly's president on cross-examination [R. 1483-1484]:

> Q. Who were the other competitors in the wall heater business in 1950, '51, '52, and '53 besides Coleman? A. I would be a little pressed for names at this time.
>
> Q. About how many were there? A. *Well, it was a considerable number. I would say a dozen or more.*
>
> Q. Would you name all that you can now think of? A. There was Day & Night with their Panel Ray, Hammill, there was a Modern at some point in there, there was also one made in Alhambra, I have forgotten the name of it, however.
>
> Special Master: Was that Cooper?
>
> The Witness: No. It was what had formerly been the Alhambra Sheet Metal Works but I forget the name they applied to the heater.

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[15]It is a paradox that Holly complains of its inability to secure 20% of the national wall heater market while insisting in this portion of its brief that Holly and Coleman were not part of that market—that the two of them exclusively enjoyed the "wall heater *with-secondary-heat-exchanger market*" and did not participate in and received no competition from the separate "wall heater *without*-secondary-heat-exchanger market" which was supplied exclusively by all other manufacturers of wall heaters.

[16]Most of three "important sales features" (Holly's Br. p. 61) are *not* patentable elements in any event.

Q. (By Mr. Stanbury): Was Williams in the market at that time? A. Yes, I think Williams was.

Q. Royal Jet? A. Yes.

Q. How many companies at that time were making single stud space wall heaters? A. During what time was this?

Q. I don't know when they started. I said '50 through '53. A. I am not sure. I think that *somewhere at least during that period most of them came to the single stud space heaters but not in all sizes.*

The directly competitive nature of the wall heaters of other manufactures was repeatedly confirmed at the original trial by Holly's Vice President, Mr. Hammond. This gentlemen was under no illusions that the patented wall heaters competed in a separate market from other wall heaters. In discussing Holly's competitive position, he referred to an exhibit which set out figures on national wall heater sales, stating:

> "Exhibit 41 is a bulletin put out by the Bureau of Census of the United States Department of Commerce in which they show, among other things, national wall furnace shipments. And we used that to compare our own sales as against national figures to determine the percentage of the market that we enjoy" [Orig. R. 443, Tr. Ex. 41].

In this connection, although during the trial below Holly stressed the importance of A. G. A. approvals [*e. g.*, Orig. R. 52, 473], in its brief to this Court Holly now insists that A. G. A. approval is meaningless (Br. pp. 67-69) and that the number of A. G. A. approved manufacturers in the wall heating market was of "no significance" to Holly (Br. p. 71). Yet when Holly's presi-

dent Johnson was asked to state the "important sales features" of Holly's heater, he immediately singled out "A. G. A. approved floor to ceiling" [R. 1417]. Again, Holly's sales manager said that avoidance of the hot wall problem per this A. G. A. approval was *"the biggest single sales advantage that we had"* [R. 1019-1020]. But observe that in, and from and after, 1954, *all* A. G. A. approved heaters had solved this problem and were directly competitive insofar as this "biggest" sales feature is concerned, as was admitted by Holly's witness Hollingsworth [R. 1164-1165; see Op. Br. p. 30]. Moreover, Mr. Hammond, Holly's vice-president, offered the following explanation for the volume decline suffered by Holly in 1953: "And I think that it is also worth to mention that a number of other manufacturers of wall heaters came into the business during this period that we have been talking about" [Orig. R. 470-471]. And throughout its brief Holly has computed its share of the market upon the basis of wall heaters generally, not in terms of any special market served only by Coleman and itself—compare the admission of Holly's Mr. Hammond, *supra,* that Holly used the U. S. Department of Commerce bulletins covering "national wall furnace shipments" in order "to compare our own sales as against national figures to determine the percentage of the market that we enjoy" [Orig. R. 443]. Obviously Holly was competing in and with the industry.

These facts, all derived from Holly's evidence, affirmatively show the absence of a special captive market such as existed in the *Livesay* case. But since the burden was on Holly to show the contrary, it is sufficient, here, to note the complete absence of other evidence.

All of this adds up to this fact: There was no special market or demand for wall heaters equipped with economizers, made according to Holly's design or any other

design. Instead, Holly competed in the wall heater market generally. Therefore, this was not a case in which it can be assumed that prospective purchasers were compelled to purchase from either Holly or Coleman, and thus one in which it might be inferred that a sale made by Coleman would probably have been made by Holly had Coleman not had an economizer. This obvious fact was stated by the Master, with the observation that it would be "highly conjectural" to find otherwise [R. 52].[17] Holly did not prove, nor is it clear that Holly even attempted to prove, and certainly it could not prove, the existence of a special market for economizer equipped heaters. (It will be remembered, of course, that Holly had no patent on economizers, this broad classification being used herein to make it all inclusive of anything Holly might claim.)

6. Claim That Holly's Actual Profits Were 19%.

The appendix to this brief is printed under separate cover to facilitate the references suggested below.

The Trial Court found Holly's average net profit on wall heater sales was 19% [Finding XII, R. 426], and multiplied Colemans' $7,635,062.00 sales by 19% to arrive

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[17]At page 15 of its brief, Holly quotes out of context the Special Master's statement that Holly *"may have been* able to make all the sales made by defendant or at least a large percentage of them" [R. 52]. But the Special Master hastened to add: "However, there is *no evidence* before me that plaintiff could have made all of the sales made by defendant . . . it would be highly conjectural to find that plaintiff could have made all of the defendant's sales but for the infringing heater" [R. 52]. In short, what the Special Master really said was: Conceivably Holly might have been able to make Coleman's sales but for Coleman's infringement, but there is absolutely no proof of this in the record and it would be pure conjecture on my part to assume so—especially since, as the Master also noted, "In my opinion some of defendant's customers would have used heaters *without the patented features,* supplied by the defendant or others . . ." [R. 52].

at the basic $1,450,661.78 judgment below [Finding XIII, R. 426]. Coleman's opening brief (pp. 37-40) demonstrates that Holly's assumed 19% profit margin is without support in the record.

In its answer brief, Holly seeks to evade this crucial problem by suggesting that the basis for its assumed 19% profit margin is not reviewable because Coleman's Concise Statement of Points on Appeal and its Specifications of Error do not descend to sufficient detail regarding the 19% finding.[18] However, Point I [R. 2016] and Specification 1 (Op. Br. p. 7) clearly assert that "the evidence does not support the award of purported lost profits, or any award except of reasonable royalty, for the reason that appellee failed to prove lost profits or any actual damage." To insure (*inter alia*) that the lost sales damage computation was in issue, Coleman further specified in Point 10 [R. 2018] and Specification 7c (Op. Br. p. 8) that damages due to lost sales "were not susceptible to numerical computation." We submit these concise specifications comply with this Court's directive on the former appeal wherein Coleman's presentation of detailed statements of error was criticized. (*Coleman Co. v. Holly Manufacturing Co.*, 233 F. 2d 71, 75).

After thus diverting attention from the real issue, Holly makes no attempt to answer the fundamental objection to the 19% profit figure advanced in the first paragraph of Section I(3) of Coleman's Opening Brief (pp. 37-38), namely, that the earliest and only records broken

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[18]Holly also asserts (Br. p. 45) that Coleman raised no objection in the court below to Finding XII which adopts this 19% figure. Although immaterial with respect to Coleman's appellate rights, the truth is that Coleman did object, most emphatically, to both Finding XII and Finding XIII [R. 353].

down to show Holly's profits *on wall heaters alone* (as distinguished from profits from *all* sources) relate to the years 1956 and 1957, and show a net profit of but 10.5% for the first six months of 1956 [Accounting Ex. 36, R. 1341] and of only 7.1% for the fiscal year July 1, 1956, to June 30, 1957 [Accounting Ex. 33, R. 1326-27]. Holly ignores these actual figures taken from its own audits, and attempts to sustain the 19% figure in two other ways:

(1) Primarily, Holly relies upon Accounting Exhibit 20, "a detailed computation made by one of Holly's accountants [Mr. Claybaugh] in accordance with Holly's standard accounting practices . . ." (Br. p. 45). However, there is nothing to indicate that the Trial Court accepted or relied on Exhibit 20 in making its 19% profit margin finding. Moreover, the exhibit is devoid of evidentiary value since it is conclusively demonstrated to be false by Holly's own accounting audits upon which the exhibit's computations are admittedly based.

The only "19%" evidence below was proof from Holly's basic audits that for 1951, 1952, and the first half (only) of 1953 its average profit was "approximately 19%" [R. 1431, 1488; Holly's Br. p. 46]. It was *this* evidence —not Exhibit 20—which the Special Master accepted [R. 49-50; Holly's memorandum supporting its proposed findings, Paragraph XII, R. 252] in fixing Holly's net profits at 19% [Finding XII, R. 252], which finding, in turn, was then adopted by the Trial Court [Finding XI, R. 426].[19] Exhibit 20 was compiled on a "per unit," not

[19]We will separately discuss this "19% evidence" in a moment. At this point we merely call attention to the fact that the Special Master made no use of Holly's assumed 19% profit figure; instead, he recommended a $785,975.85 award representing the net profit made by Coleman on its infringing wall heater sales [Finding XXII, R. 67].

a *percentage,* basis. If accepted, it would have required a basic judgment of $1,475,010.00 [Ex. 20], not the $1,450,661.78 actually awarded. And although Exhibit 20's final $1,475,010.00 "profit" may be divided by Coleman's $7,635,062.00 net sales [a figure which is not even shown on Ex. 20] to produce a percentage figure of 19.3, no such computation was attempted below by the Special Master, the Trial Court—or even Holly itself [see Holly's memorandum supporting its proposed findings, Paragraph XIII, R. 253-254].

But assuming, *arguendo,* that Exhibit 20 on its face sustains the "approximately 19% profit" figure and was so accepted by the Trial Court, it is easily demonstrated that the exhibit is so misleading as to border upon the fraudulent, and that it is contradicted and vitiated by the very audits upon which it purports to rest.

Holly presents Exhibit 20 as a computation showing "Holly's average profit per wall heater" (Br. p. 45) during the entire infringing period—not, please observe, the average profit Holly *might have earned* on *Coleman's* sales had they been made by Holly, *but the profit Holly actually did make on its own actual sales:*

> "The figures are shown in Accounting Exhibit 20. Mr. Claybaugh [Holly's accountant who prepared the exhibit] found that Holly's average profit per wall heater *was* as follows . . ." (Holly's Br. p. 45; emphasis ours).

And if the Special Master and Trial Court are assumed to have relied in any part upon Exhibit 20 in determining Holly's average profit to be 19%, they must also be assumed to have understood the exhibit to present *actual,* not hypothetical, profit figures since they respectively

found (emphasis added): . . . that plaintiff's net profit on the patented wall heaters *was* approximately 19% of its net sales . . ." [Finding II, R. 61], and that, "Plaintiff's net profit on the patented wall heaters *was* approximately 19% of its net sales" [Finding XII, R. 426]. In fact, the Special Master, who alone made any reference to Exhibit 20 in connection with his findings, specifically revealed that he understood this exhibit to present *true* profit figures:

> "The evidence [i.e., Exhibit 20] shows that during 1952 plaintiff *made* an average sales profit *per unit sold* of $14.52 . . ." [R. 50, our emphasis].

Actually, however, the net "sales profit" figures shown on Exhibit 20 for each of the years involved do *not* represent true net profits. *Per contra,* they represent the net profits Holly *would have* earned on its actual sales *if it had incurred no administrative or engineering expenses whatever.*

For example, the $1,072,777.00 "gross profit" figure listed on Exhibit 20 for 1952 was taken directly from Holly's audited Profit and Loss Statement for that year [Ex. "B" to Accounting Ex. 24, R. 1312].[20] Similarly, Exhibit 20's "selling expense" figure of $219,412.00 coincides with the corresponding figure on Exhibit 24. The difference between these two figures is the $853,365.00 "sales profit" given on Exhibit 20. *But the audited 1952 Profit and Loss Statement itself also lists—and deducts—*

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[20]Mr. Claybaugh conceded that the figures pertaining to Holly which he used in Exhibit 20 *were taken directly from Holly's annual audits for the years involved* [*e. g.,* R. 1317-1318, 1321]. These audits were prepared by independent certified public accountants [R. 1315-1316, 1318], not by Mr. Claybaugh who was in Holly's full time employment as its "budget director" [R. 1315].

"administrative and engineering expenses" of $292,672.00, and thus shows a Net *profit of only $560,693.00.* The difference between Holly's actual 1952 net profits of $560,693.00, as shown by its certified audit [Ex. 24], and the spurious figure of $853,365.00 given on Exhibit 20, is due entirely to the fact that *the former properly deducts, whereas Exhibit 20 improperly ignores, administrative and engineering expenses of $292,672.00.* When Holly's correct 1952 net profit figure is substituted for the incorrect figure used in Exhibit 20, its true 1952 per unit sales profit drops from the fictitious $14.52 shown on Exhibit 20 to merely $9.05.

The profit figures for each of the other years shown on Exhibit 20 (1953 through the first three months of 1957) are similarly derived *by omitting all administering and engineering expenses.* To facilitate the Court's consideration of this matter, Holly's Exhibit 20 is reproduced on a fold-out sheet in Appendix B to this brief, immediately following which we have also reproduced Holly's profit and loss statements, and the cost of goods sold, manufacturing, selling, administrative, and engineering expense schedules from Holly's certified annual audits for the years 1952, 1953, and 1954 [Accounting Exs. 24, 25, and 26, R. 1312-1313]. A comparison of the "gross profit," "sales expense," "administrative and engineering expense," and "net profit" figures on the profit and loss statement in Holly's basic audit for each of the other years involved, with the corresponding figures on Exhibit 20 (as we have just done for the year 1952), will reveal that in each year Exhibit 20's "net profit" figure is perfidiously (to exactly the extent of the year's aggregate administrative-engineering expenses) in excess

of the true figure contained in the audit itself—as is shown by the following tabulation:[21]

	Holly's Actual Profits (per basic audits, Exhibits 24, 25, 26, 27, 28, and 29)	*Profits Per Exhibit 20*	*Difference, or Omitted Engineering and Administrative Expenses* (per basic audits, Exhibits 24-29)
1952	$560,693.00	$ 853,365.00	$ 292,672.00
1953	$389,648.00	$ 709,989.00	$ 320,341.00
1954	$419,444.00	$ 854,685.00	$ 435,241.00
1955	$712,302.00	$1,091,424.00	$ 379,122.00
1956	$258,564.00	$ 749,555.00	$ 490,991.00
1957	($ 37,691.00)	$ 90,407.00*	$ 126,620.00*
	Total omitted expenses		$2,044,987.00

[21]Holly's profit and loss statements (captioned, "Statement of Earnings") for 1955, 1956, and the first 3 months of 1957, are also in evidence as Accounting Exhibits 27, 28 and 29 [R. 1313], but in the interests of space are not reproduced in Appendix B hereto. Exhibit 28, for 1956, consists of two sheets, one covering the period from January 1 through June 30, and the second (labeled "Fiscal Year to Date") covering the remaining 6 months of 1956; hence, the figures on the two sheets must be aggregated to reach the correct results. Exhibit 29, for 1957, contains three sheets and covers the fiscal period *from July 1, 1956,* through March 31, 1957 (thus overlapping Exhibit 28). But if the figures in the "This Month" column at the left margin of each of the three sheets are totaled, it will be found that, *after deducting administrative-engineering expenses,* Holly's sales showed a net profit for January of $4,987.00 and *net losses* for February of $16,420.00 and for March of $26,258.00, or, for the 3 month period, a net LOSS of $37,691.00—as contrasted with the net profit of $90,407.00 incorrectly shown for this same period on Exhibit 20.

*Accounting Exhibit 29 shows, for the first three 1957 months a gross profit of *$88,929.00* less administrative-engineering expenses of $126,620.00, or a let *loss* of $37,691.00. *The $90,407.00 "profit" for these 3 months shown on Exhibit 20 is $1,478.00 in excess of the proper figure even before deducting administrative-engineering costs.*

That administrative-engineering expenses were *not* deducted in computing Holly's "sales profit" on Exhibit 20—notwithstanding the fact that Holly's basic audits properly deduct administrative and engineering (as well as manufacturing and selling) expenses from "gross profit" in determining net profit [*e.g.,* see 1952 Profit and Loss Statement of Ex. 24 in Appendix B hereto]—was admitted by Mr. Claybaugh [R. 1321-1323]. See, too, Holly's brief, page 46, and the caveat on the face of Exhibit 20 itself:

> "*The above profit computation assumes Administrative and Engineering expenses remain fixed regardless of volume* and that Sales expenses varies [*sic*] in proportion to volume." (Our emphasis.)

In the somewhat obscure idiom of accountancy, what Mr. Claybaugh means is that, in preparing Exhibit 20, he *assumed* that Holly's administrative and engineering expenses would be the same each year *regardless of how many heaters it sold—i.e.,* would "remain fixed"—whereas selling (and manufacturing) costs would rise substantially in proportion to sales volume. *Ergo,* Exhibit 20 computes Holly's average profit by merely deducting selling-manufacturing expenses from gross sales *and ignoring administrative-engineering costs* entirely; and what Exhibit 20 terms Holly's "average sales profit per unit sold" represents the profit Holly would *presumably* have enjoyed on *Coleman's sales* had Holly been able to make those sales *in addition to its own—and if it could have made those $7,635,062.00 additional sales and manufactured*

and delivered those 118,418 additional wall heaters without incurring one additional cent of administrative or engineering costs. This, Holly insists, is most "conservative" (Br. p. 46), and "more favorable to Coleman than it should be" (Br. p. 47), because the "fixed" elements of manufacturing and selling expenses which Exhibit 20 treats as variable "more than offset any variable items of administrative and engineering expenses" (Holly's Br. p. 46). Precisely this same excuse is offered by the caveat on the face of Exhibit 20 itself:

> "*This is a very conservative appraisal* ignoring the fact that *some elements* of Sales Expenses are fixed. This method of computation could be further justified by the fact that fixed portions of Manufacturing costs *such as Depreciation, Real Estate Taxes, Insurance,* which have been ignored [i. e., treated as 'variable' rather than 'fixed'], *more than offset variable items of Administrative and Engineering expenses.*" (Emphasis added.)

The record contains no smidgen of evidence to support this hypothesis. Moreover, this Court knows judicially that *neither* administrative-engineering *nor* manufacturing-selling expenses remain fixed regardless of sales volume, but that, contrariwise, these four critical expense elements all necessarily increase as sales volume expands.[22] At all

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[22]Courts take judicial notice of accounting and bookkeeping practices as well as of normal business experience and tendencies: *Baltimore & O. C. T. R. Co. v. Becker Milling Mach. Co.,* 272 Fed. 933, 935 (C. C. A. 7, 1921), and syl. 3; *Ransome Concrete Machinery Co. v. Moody,* 282 Fed. 29, 36 (C. C. A. 2, 1922), and syl. 14; *Decker v. Korth,* 219 F. 2d 732, 737 (C. C. A. 10, 1955).

events, Mr. Claybaugh's incredible postulate is demolished by Holly's own accounting records.

Thus, Holly's annual audits for the years 1949 through 1954 [Accounting Exs. 21-26, respectively, R. 1311-1313], and its profit and loss statements for the years 1955 through the first three months of 1957 [Accounting Exs. 27-29, respectively, R. 1313] establish that in no two of those eight years (plus three months of the ninth year) did Holly achieve the same sales volume. *Yet its manufacturing costs, its selling expenses, its administrative expenses, and its engineering expenses were drastically different in each of these periods,* thereby conclusively demonstrating that all four types of expenses are variable, *and that none remain fixed irrespective of volume. Furthermore, these exhibits establish that all four types of expenses increase when gross sales increase.* This is quickly illustrated by the following tabulation of Holly's gross sales, manufacturing costs, sales expenses, and administrative-engineering expenses for the years 1949 through 1954, with all of our figures being taken directly from Holly's annual audits for this period [Accounting Exs. 21-26, respectively]:[23]

[23]Accounting Exhibits 27-29 [R. 1313] demonstrate this same relationship between selling, administrative, and engineering expenses, on the one hand, and gross sales, on the other hand, for Holly's years 1955, 1956, and the first three months of 1957. However, *manufacturing* costs are not segregated from other items (such as material costs) in the "cost of goods sold" line on these exhibits. Hence, we are unable to include manufacturing cost figures for these periods in our tabulation.

Year	Gross Sales	Manufacturing costs	Sales Costs	Administrative-Engineering costs
1949	$1,853,851	$362,166	$130,484	$173,725
1950	$2,409,488	$479,330	$166,435	$209,870
1951	$2,859,622	$553,273	$197,382	$244,725
1952	$3,305,269	$672,984	$219,412	$292,672
1953*	$3,234,930	$829,955	$245,070	$320,341
1954	$3,568,055	$724,403	$305,397	$435,241

Finally, an examination Holly's actual manufacturing and selling expenses during the years in question, as itemized on schedules "2" and "3," respectively, of Holly's basic audits [Accounting Exs. 21-26], proves beyond question that Exhibit 20's disregard of $2,044,987.00 administrative-engineering expenses between January 1, 1952, and March 31, 1957, cannot possibly be offset—much less "more than offset" [Ex. 20, caveat]—by the "fixed" items of manufacturing and selling expenses which Exhibit 20 "conservatively" treats as variable.

For example, schedule "2" of Holly's 1952 audit [Ex. 24] lists aggregate manufacturing expenses of $672,-984.31, of which "labor," "payroll taxes," and "supervision" *alone* account for $612,260.13, leaving but $60-

*Although Holly's 1953 gross sales were slightly lower than in 1952 and 1954, its manufacturing costs were *higher* in 1953 than in the other two years, which is inconsistent with the postulate that any appreciable portion of manufacturing cost remains fixed. Also, while administrative-engineering costs were somewhat lower in 1952 than in 1953 notwithstanding Holly's slightly higher 1952 gross sales, *this is true also of selling expenses,* which again illustrates that variability is not the exclusive property of either cost element. Incidentally, schedule "5" of each Holly audit, listing "engineering expenses," reveals that not one fixed item has been included but that every iota of engineering cost is variable.

724.18 which could possibly be termed "fixed" expenses. And most of the other items listed are as unarguably "variable" as the three just mentioned.[24] Schedule "3" of this same audit itemizes "selling expenses" of $219,412.34; yet only "insurance, general" ($76.32) is a clearly "fixed" item. (This and Holly's other "selling expense" schedules explain why Mr. Claybaugh's caveat to Exhibit 20 vaguely mentions that "some elements of Sales Expense are fixed," without specifying what elements he had in mind.) Is Exhibit 20 being "conservative" when it attempts to offset 1952 administrative-engineering expenses of $292,672.02 [Ex. 24, Schedules "4" and "5"] simply by conceding the foregoing niggardly (comparatively speaking) "fixed" elements of manufacturing and selling costs? If the Court will examine the scheduled manufacturing, selling, administrative, and engineering expenses for each of the other years covered by Holly's basic audits (*e.g.,* see Appendix B hereto), it will instantly see that in each year Holly's administrative-engineering expenses are more than double the maximum conceivably "fixed elements" of its manufacturing-selling costs for that same year. Therefore, Holly's own accounting audits prove that Exhibit 20's failure to deduct over two million dollars worth of administrative-engineering expenses during the infringement period cannot be justified upon the undeniably false premise of "offsetting" fixed elements of manufacturing-selling costs. Since

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[24]For example, "shop supplies," $10,650.97; "insurance on employee," $15,409.86; "production supplies," $4,911.90; "material handling," $10,248.42; and "employee relations," $4,720.59. To assume, even, that general insurance, real property taxes, and building depreciation are "fixed" must in turn rest upon another drastic assumption that Holly might have increased its output some 34% by adding Coleman's sales to its own without having been required to enlarge its manufacturing facilities.

Holly's administrative-engineering expenses were in each year far in excess of its fixed manufacturing-selling costs, the omission of *all* of the former cannot possibly be counterbalanced or "more than offset" by merely "some fair proportion" of the latter. We have only the bald assertion of Mr. Claybaugh regarding this "offsetting," which, being an inherently incredible suggestion *flatly contradicted by the very accounting records from which his Exhibit 20 was prepared,* is without evidentiary value.[25]

(2) To sustain Holly's fictional "19%" profit margin there remains only Holly's alternative contention (Br. p. 45) that "during a reasonable period" its average net profit from heater sales was 19%. The period selected by Holly, however, is not "reasonable" but completely arbitrary: 1951, 1952, and the *first half of* 1953 [R. 49-50, 252-253]. No explanation has ever been offered by Holly for choosing this bobtailed, unrepresentative, arbitrarily selected 30 month period as establishing its true profit margin. This Court possesses judicial knowledge of general business conditions,[26] particularly of post-war economic upturns,[27] and therefore knows that Holly is attempting to predicate its profit margin upon its ex-

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[25]Compare, *e.g., Geigy Chemical Corporation v. Allen,* 224 F. 2d 110, 114 (5th Cir., 1955): "Courts are not required to believe testimony which is inherently incredible or which is contrary to the laws of nature and of human experience, or which they judicially know to be unbelievable." And see the well known statement by Van Fleet, V. C., in *Daggers v. Van Dyck,* 37 N. J. Eq. 130, 132-133 (1883).

[26]*Dayton P. & L. Co. v. Public Utilities Commission,* 292 U. S. 290, 311, 78 L. Ed. 1267, 1281 (1934).

[27]*Great Northern R. Co. v. Weeks,* 297 U. S. 135, 149, 80 L. Ed. 532, 541 (1936); *Galveston Electric Co. v. Galveston,* 258 U. S. 388, 402, 66 L. Ed. 678, 686 (1922); *Ransome Concrete Machinery Co. v. Moody,* 282 Fed. 29, 35 (C. C. A. 2, 1922), and syl. 13.

perience during the Korean War boom period. Moreover, we respectfully suggest that, being fully cognizant of the fact that through a process of simple mathematics Exhibit 20 might be construed to indicate a 19.3% profit margin, Holly deliberately selected this truncated 30 month period solely because it fortuitously yields a consistent 19% (actually, 18.94%) result—like the proverbial "pencil engineering" of the student who commences with his answer and works backward to solve it. At any event, there can be no justification for excluding the last half of 1953, especially since Holly's profit margin for this entire year was 13.8% [see p. 4 of Accounting Ex. 25, R. 1312] as contrasted with the adventitious 19.7% figure for merely the first six months. Nor, in fact, is there any rational basis for embracing only this implausible, abbreviated 30 month period and eliminating all other years involved (see Coleman's Op. Br. pp. 37-40).[28]

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[28]It is, incidentally, paradoxical that Holly (Br. p. 47) should criticize the table shown at page 39 of Coleman's Opening Brief in part because, "The first three months of 1957 are given the same weight as a full year." Holly itself did not hesitate to use figures for only part (the first half) of 1953 when this method of computation served its own purposes; and only by giving to this one-half year "the same weight as a full year" can Holly's profit margins for 1951 (20.1%), 1952 (17.4%), and the *first half of* 1953 (19.7%) provide a "19%" (19.07%) average profit figure. (When properly averaged mathematically, these figures give a margin of 18.75%.) Although in its page 39 (Op. Br.) table Coleman simply followed Holly's lead, if 1957 is omitted therefrom and if the 1956 figures are combined to a single average profit of 6.1%, Holly's average profit margin for the full years 1952 through 1956 still amounts only to 12.0%—far short of "19%." Also, Coleman's page 39 table is overly favorable to Holly in that the 2.8% profit figure there shown for 1957 overlaps 1956 and is for the period from *July 1, 1956,* through March 31, 1957. Actually, as hereinbefore demonstrated, Holly's Accounting Exhibit 29 establishes that for the first three months of 1957 Holly operated at a *net loss* of $37,691.00.

In summary, it is utterly incredulous that Holly has been able to attain the same answer (a "19%" average profit margin) by, on the one hand, using *actual* profits remaining *afterproperly deducting not only manufacturing-selling expenses but also administrative engineering expenses* during an abridged and capriciously selected 30 month period. and, on the other hand, by using wholly fictitious net profit figures for the years 1952-1957 *which are derived by completely ignoring over two million dollars of administrative-engineering costs.* We submit Holly's profits during the artificially chosen, fragmentary two-and-one-half year period from January 1, 1951, through only the first half of 1953, are devoid of probative value in establishing Holly's average profit margin; and the purely fictional profit figures shown on Exhibit 20 are equally incapable of sustaining the judgment below. We resubmit, therefore, that Holly's claimed "19%" profit margin—upon which the basic $1,450,661.78 judgment herein is entirely predicated—finds no support whatever in the record.

7. Claim That Holly Is Entitled to Coleman Profits.

Holly suggests that *even without proof of lost sales* it is entitled to Coleman's profits (Br. 41). This suggestion was recognized as erroneous by the Trial court [R. 1871]. The present patent damage statute (35 U. S. C. Sec. 284) does not provide for the recovery of profits *as such.* The law was changed in this respect in 1946 (see Appendix A, under separate cover). Finding XI [R. 426] which states that Holly's damages are Coleman's profits or Holly's profits if it had made Coleman's sales, "whichever is the larger" is clearly based on lost sales with respect to both alternatives for, as stated by the Trial Court, an infringer's profits "are only

relevant on the issue of what the plaintiff lost" [R. 1871]. It is not anticipated that this Court will be in doubt that this is so under the present statute, but a review of the legislative history of the 1946 amendment and pertinent decisions appear in Appendix A hereto. If the patentee would, in reasonable probability, have made the infringer's sales but for the infringement, and if the infringer's profits would have at least equalled the patentee's, then the infringer's profits may be considered an element of damage. As shown elsewhere, however, in this case there is no basis for a conclusion that Holly would have made Coleman's sales or any appreciable part thereof except for the infringement. Therefore, without proof of actual damages, under the present statute Holly could be entitled to no more than a reasonable royalty (see Coleman's Op. Br. Point V, pp. *77 et seq.*).[29]

8. Claim That Coleman Sales Followed a Trend Established by Holly.

It is speciously argued in Holly's brief that Coleman's sales followed a trend established by Holly (Br. 65-66). This argument is based on charts appended to Holly's brief. But the charts have no standing whatsoever as evidence; they are not in evidence and there is no testimony

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[29]At page 40 of its brief, Holly cites one Fifth Court of Appeals decision in which infringers profits were employed as the measure of damages under the particular facts there involved (see footnote). Holly then urges, *in italics*, that the United States Supreme Court "significantly" denied certioriari, thereby exhibiting disdain for "arguments which are the very same as those which Coleman has presented in the present case." Nothing is more elementary than that, as pointed out by Mr. Justice Holmes in *Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401, 403-404, 76 L. Ed. 1142, 1143 (1931): "But 'the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.' "

relating to the statistical comparisons made therein. Moreover, they are very misleading. Both Holly and Coleman were in the wall heater business prior to the sale of wall heaters *with economizers,* but the charts fail to take that fact into consideration. They appear to indicate that Coleman first entered the wall heater business in 1952, whereas the fact is that Coleman had a full line of single stud space wall heaters on the market as early as 1949 [Orig. R. 321]. Holly was also in the wall heater business prior to 1950 [Orig. R. 429], contrary to the implication of the charts. Obviously, before it can be said that Coleman followed any trend set by Holly, one must know what both were doing and what status they had achieved in the wall heating industry *before* the trend is alleged to have started.

9. Claim That Coleman Was Properly Adjudged Guilty of Contempt.

Holly's answer (Br. 75-87, Point X) to Section IV (pp. 71 *et seq.*) of Coleman's opening brief is largely devoted to insisting that Coleman's "chute" merely *reduced* the flow of pink air into its economizer, but did not prevent it *completely* (Br. 76), wherefore the chute is labeled "a clumsy subterfuge" (Br. 77). Inasmuch as Holly has always conceded, as assuredly no one could deny, that it was unnecessary for Coleman to exclude *all* pink air from its economizer in order to avoid infringement, and that the determinative question is whether *sufficient* pink air enters the economizer *to contribute to the efficiency of its operation* [*e.g.,* R. 700, 710, 766; Coleman's Op. Br. 51], this provides no refutation whatever to Coleman's position. *Per contra,* we submit Holly's own brief demonstrates conclusively that *with the chute installed* Coleman's heater did *not* infringe Holly's patent:

(1) In discussing the "brown air," Holly's brief points out that Landsberg's "new" tests indicated that, without the chute attached, Coleman's economizer received 14.9% "pink" air and 4.5% "brown" air (Br. 83). The Trial Court found, during the course of the contempt hearing, that 14% of Coleman's *non*-chute-equipped economizer was "pink" and that 6% thereof was "brown" (Br. 85). *Hence, if we adopt arguendo Holly's own figures, Coleman's economizers unequipped with chutes received 14% to 14.9% of their air from the "pink" or infringing source, and 4.5% to 6% of their air from the noninfringing "brown" source.*

(2) The Trial Court found that when the chute was added to Coleman's economizer, it excluded two-thirds of the 14% to 14.9% "pink" air, permitting only one-third thereof to enter (Br. 85).[30] That is to say, on this premise, *with the chute installed Coleman's economizer received only one-third of 14%, or 4.666%, or one-third of 14.9%, or 4.966%, of its air from the infringing "pink" source.*

(3) As above noted, if Holly's own figures are accepted as correct, *Coleman's economizer received almost exactly this same percentage, or even a somewhat larger, percentage of air from the noninfringing "brown" source:* 4.5%, allegedly according to Landsberg (Br. 83), to 6% according to the trial judge (Br. 85).

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[30]At page 77 of its brief, Holly states that the "chute" did not "reduce the passageway" for pink air, but merely made it "a little longer," citing "R. 551." Presumably Holly intends thereby to imply that the chute had little or no effect upon the flow of pink air into the economizer. However, at R. 551 Mr. Harmon definitely testified that the chute "actually restricts the passage" and, by interposing "bends in the flow," creates a very definite "restriction" to the entry of pink air. At all events, the Trial Court expressly stated that the chute cut off two-thirds of the pink air which would otherwise enter Coleman's economizer [R. 766].

(4) Finally, Holly in its present brief dismisses that 4.5% to 6% of "brown" air as too insignificant a quantity to be of any consequence. It insists that, "Comparatively, that [brown] is not a major source of air by any means" (Br. 23), and further contends (Br. 12; our emphasis):

> "The District Court witnessed the Coleman tests and also witnessed tests conducted by Holly which showed that the 'brown' air path into the economizer *was insignificant. . . .*"

If 4.5% to 6% of "brown" air in Coleman's economizer is an "insignificant" quantity, and if, as Holly's own brief demonstrates, Coleman's economizer with "chute" attached could receive no more than 4.666% to 4.966% of its air from the infringing "pink" source, the "pink" air which leaked into the economizer was fully as "insignificant" and nonutilitarian a quantity as the 4.5% to 6% of "brown" air. By the same token, Coleman's economizer with chute attached could not possibly infringe Holly's patent, and there is no justification for the Trial Court's finding that Coleman was guilty of contempt.

Other contentions advanced in this portion of Holly's brief are equally fallacious. Thus, Mr. Berry did *not* testify that Coleman's heater could not meet A.G.A. approval if all "pink" air were hermetically sealed out of the economizer (Br. 84; also, 25-26, 31, 93-94). Holly is there referring to testimony by Mr. Berry regarding experimental tests conducted with aluminum tape [a temporary expedient employed solely for test purposes R. 1548],[31] and he testified flatly that excluding "pink" air had no effect whatever upon the heater's performance

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[31]A heater partially sealed off with aluminum tape would not likely satisfy A. G. A. requirements regardless of its performance.

[R. 1566]. As for the somewhat similar statement lifted out of context from a letter written by Mr. Olds to Mr. Dawson (Br. 93; see Coleman's Op. Br. 59-61), Mr. Olds was there obviously concerned over the fact that using a "baffle" would prevent air from passing *up the flue into and out of the attic,* thereby creating a wall heating problem, but one which is irrelevant to the instant question of the effect upon wall heating of excluding "pink" air *from the economizer.*

In any event, we have already demonstrated herein *from Holly's own brief* that a mere 4.666% to 4.966% of "pink" air in Coleman's economizer (and assuming that there was that much) is of no utilitarian value whatever, and so "insignificant" in quantity as to be incapable of affecting the economizer's efficiency. Moreover, as emphasized in our opening brief (*e.g.,* p. 50), there has never been one iota of *evidence*—as, perforce, there could not be—that so unsubstantial a quantity as 5% or less of an economizer's air could contribute to its efficiency. Bearing in mind Holly's admission that unless the quantity of "pink" air in Coleman's economizer were sufficient to affect its operation no infringement would result—the unsubstantial quantity of "pink" air being disregarded as *"de minimis"* (Op. Br. 51)—we submit Coleman's adjudication of contempt is patently erroneous and must be reversed.

The foregoing has made the most unfavorable assumption possible from the record. Later, the Court said that what it had *actually* concluded was that 6% of the *"pink"* infringing air, not the "brown," reached the economizers [R. 1865]. If this is true, what is said above is greatly emphasized, for the chute would then have reduced the infringing air from 6% to 2%.

10. Claim That the Degree of Infringement Is Irrelevant.

Holly asserts (Br. 34) without citing any cases that the courts "have never recognized degrees of infringement." This is not true *as applied to the question of damages.* Upon facts like those of the present case, the courts have recognized that the rule *de minimis* is properly applicable (see case cited Op. Br. 87). As stated in the *American Telephone* case (5 F. 2d 535, 536), where *"the infringement was only a mere trifling infraction of plaintiff's rights, the value of the property of plaintiff so tortiously taken by the defendant or converted to his use is nominal and not substantial, and in such cases only nominal damages, as distinguished from profits, can be assessed against the infringer"* (italics added).

11. Claim That Appeal Is Frivolous, Subjecting Coleman to Further Penal Damages.

Now Holly seeks an additional penalty of 10% of the judgment (or $250,864.27), and double its costs, upon the ground that this appeal is taken upon "frivolous and vexatious" grounds (Br. p. 97). This Court is in a position to determine whether the instant appeal is taken upon frivolous grounds, merely to vex and delay. Coleman has posted a stay bond, and, if the judgment were affirmed, would be paying more than $175,000 per year in interest alone for the privilege of presenting its case to an appellate court, an expenditure no one would undertake for merely vexatious motives.

In thirty years of practice the writer of this brief does not recall another case in which it has been necessary to resort to a reviewing court to establish issues which are, to him at least, as obvious as those presented here, and

therefore none in which an appeal has seemed, to him, more meritorious. Significantly, and telling against any pretense that the issues are frivolous, Holly does not meet them as they actually are, but resorts to evasion and actual misrepresentation. Thus it flatly denies that the evidence upon which it originally procured the finding of infringement was shown, *without rebuttal,* to be grossly erroneous. It actually states that the new evidence was "old evidence" which the Trial Court had considered and rejected at the *original* trial, whereas in truth, as quoted above, the Trial Court enormously down-graded its original estimate of the quantity of infringing air after witnessing the revelation at the subsequent *contempt* hearing. Therefore, of course, Holly did not make its denial before the trial judge. It could not dispute to him what he had seen for himself and commented upon, although it will do so here in the hope that perhaps the truth cannot be demonstrated from a printed record.

This pretense is now compounded by the charge that by revealing the error Coleman was attempting to "retry the whole case," whereas it is perfectly clear that the new evidence was vital to many issues: the value of what had been taken by the infringement; whether the infringer deliberately made use of the invention in bad faith or merely failed completely to eliminate a non-beneficial air leakage (which is the fact); whether the modified heater infringed; and the whole question of the infringer's equitable position in the case. Also, Holly does not find it feasible to meet the supposedly frivolous issues head-on, but prefers to misrepresent Coleman's contentions so as to make them appear so.

It would seem that if any penalty were to be imposed it should not be against Coleman.

CONCLUSION.

The facts do not permit Holly to show that it would have made an appreciable or ascertainable number, if any, of Coleman's sales but for the infringement. Holly has nevertheless been awarded enormous damages on the assumption that it would have made all of Coleman's sales. To those sales has been applied a rate of profit which Holly claims to have been making, but which is wholly theoretical (section 6, above). Even more damages have been added by way of penalty, without evidence of bad faith and on a record which affirmatively shows that there was none. Finally, a judgment of contempt was made without evidence that the device before the Court infringed. The entire judgment lacks evidentiary support. As submitted in Appellant's Opening Brief (83-87) the record permits this Court to direct the entry of a proper judgment.

Respectfully submitted,

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